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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JUAN LUIS BOSCIO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ of Certiorari to the United States Court of Appeals For the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can a person who has been tried and convicted by the Federal Government for a crime which has various incidents included and made part of it be tried for one of those incidents a second time without being twice put in Jeopardy for the same offense?

TABLE OF CONTENTS

		Page
INTRODUCTION		1
I.	OPINION BELOW	1
II.	JURISDICTION	2
III.	PERTINENT LAWS AND RULES INVOKED IN THIS CASE	2
IV.	STATEMENT OF THE CASE	2-4
V.	ARGUMENT	5-9
VI.	CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Abney v. United States 431 U.S. 651 (1977) 8-9

Berger v. United States, 295 U.S. 78, 88 (1935) 7

Blockburger v. United, 284 U.S. 299 (1932) 5,8

Brown v. Ohio , 432 U.S. 161 (1977) 8

Flanagan v. United States, 79 L.Ed. 2d 104 S. Ct. 8

Green v. United States, 79 S.Ct. 22 1,
355 U.S. 199 (1957) 8

Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed. 2d,
97 S.Ct. 2912 (1977) 8

In Re Nielsen, 131 U.S. 176, 33 L.Ed. 118,
9 S.Ct. 672 8

STATUTORY PROVISIONS:

28 U.S.C. Sec. 1254(1) 2

18 U.S.C. Sec. 1343 2

18 U.S.C. Sec. 1951 and 2 2

Rule 17.1(a) of the Rules of the Supreme Court 2

Fifth Ammendment of the United States
Constitution 2

IN THE

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JUAN LUIS BOSCIO,
Petitioner,
V.
UNITED STATES OF AMERICA
Respondent,

On Petition For A Writ Of Certiorari To the United States Court of Appeals For the First Circuit

PETITION

TO THE HONORABLE COURT:

NOW Comes Petitioner, Pro se and respectfully prays, from this Honorable Court to issue a Writ Of Certiori to review the Judgment entered on February 2, 1988, by the United States Court of Appeals for the First Circuit and the Order denying rehearing en Banc entered on March 10, 1988.

I. OPINION BELOW

a) Judgment denying Interlocutory Appeal by the United States Court of Appeals for the First Circuit on Double Jeopardy, rendered on February 2, 1988.

b) Order denying Rehearing en Bank by the United States Court of Appeals for the First Circuit on March 10, 1988.

II. JURISDICTION

The Jurisdiction of this Honorable Court is invoked to review by Writ of Certiorari an Interlocutory Appeal on the grounds of Double Jeopardy which is appeallable by virtue of 28 U.S.C. 1291 as an exception to the finality rule.

This Honorable Court has jurisdiction to review by Writ of Certiorari under 28 U.S.C. 1254 (1) and Rule 17.1 (a) of the Supreme Court Rules.

III. PERTINENT LAWS AND RULES INVOKED IN THIS CASE

Fifth Ammendment of the United States Constitution which provides:

> "nor shall any person be subject for the same offense to be twice put in Jeopardy of life or limbe."

IV. STATEMENT OF THE CASE

Petitioner Juan Luis Boscio, was indicted on charges for aiding and abetting in violation of 18 U.S.C. Section 1343 on February 1, 1985 and convicted on October 31, 1985 Criminal Case Number 85-024 (GG). That same day, October 31, 1985 Petitioner was again indicted on Three Counts of Extortion under 18 U.S.C. Sections 1951 and 2, Case Number 85-449 (GG).

The indictment on the First offense was procured by a Grand Jury presided by José Mariani, who was assisted by AUSA Lydia Lizarribar, who was also the prosecutor during the Trial.

The alleged facts that provoked the first indictment on

case 85-024(GG) were alleged to have occurred from May 1982, to February, 1983. See: (Appendix at page 6a to 7a.), while the alleged facts that provoked the Second indictment did not occur until July and August, 1983. See: (Appendix at page 7a).

Therefore the two disctinct indictments narrate facts that occurred in different years, 1982 and 1983.

The second indictment charges that Defendant Boscio commited Extortion by receiving in June, 1983, some alleged Kickbacks amounting to $120,000 in Money Orders of $1,000 each, which was derived from a $660,000 payment to Mr. Miguel A. Serrano from the Ponce Municipal Development Authority.

To procure the first indictmnet the government through the testimony of Case Agent F.B.I. Harry García mislead the indicting Gran Jury upon presenting to it, the day the indictment was rendered, February 1, 1985, the *incident* which was the same incident that afterwards was presented to the second Grand Jury in order to indict in the Second Case.

Upon making his final presentation to the First Grand Jury the F.B.I. Agent testified as follows:

> "From this million dollars, through my investigation, I traced that $120,000 he gave to Mr. Boscio.
>
> Q. And in what form, sir?
>
> In the form of money orders."

Although the Prosecutor and the Case Agent knew that this incident was not part of the pertaining facts of the

same indictment they refrained from presenting any dates as to that alleged occurrence and led the grand jury to believe or otherwise to infer, that Petitioner Boscio had in fact obtained that alleged money as his benefit from the transaction, therein presented, so as to link Petitioner Boscio as having obtained economic gain in the series of transactions that took place from May, 1982 to February, 1983, the span of time of the First indictment.

Therefore, the first grand jury was intentionally led to believe that from those transactions, Petitioner Boscio had received $120,000 in money orders.

Defendant Boscio was taken to Trial and all through the trial he was hardly mentioned and no evidence was presented that in any way linked him to or showed any guilt as to the transactions refered to in the indictment, except that the evidence of the alleged Extortion was brought to trial, as was previously done by Agent García to the grand jury. See (Appendix at page 4a, last paragraph).

The *incident* of the alleged extortion was made part and utilized by the government to obtain the convicton, it was in fact, made an element of the alleged fraud and that incident was adjudged by the jury when they rendered their verdict.

On October 31, 1985, Petitioner Boscio was again indicted on the *incident* of the alleged extortion which had been made an element of the First case.

We moved for dismissal on Double Jeopardy grounds and the District Court denied our motion to Dismiss, which in turn was appealed to the United States Court of Appeals for the First Circuit which denied our appeal to which I present this Petition for a Writ of Certiorari.

V. ARGUMENT

The facts presented in this Case, are very unique by the fact that the government has made an act separate in time, an ingredient, or an *incident* to indict and prosecute for that offense under one statute and sudsequently has instituted a second prosecution for the same *incident* under a different statute.

The Prosecution has in the first instance, intentionally, misguided the grand jury into indicting for one offense and subsequently has completed the prosecution under false pretense, making the court believe that an alleged act was part of the first offense when in fact, said alleged act or incident could not have been part of that first prosecution because it did not exist at the time the facts that provoked the first indictment took place.

The conduct observed by the government in prosecuting the case should be rejected as offensive to the judicial conscience and repugnant to the double jeopardy clause of the fifth ammendment.

Indeed the government has created a "sui generis" double jeopardy through its own conduct and designs as I will further argue.

The United States Court of Appeals for the First Circuit has denied my appeal by simply stating that the indictments focus on different conduct and different statutes, stating that the fraud took place between May, 1982 and February, 1983, while the extortion did not occurr until July and August, 1983. See: (Appendix II at pages 6a and 7a), basing its conclusion on *Blockburger v. United States 284 U.S. 299 (1932)*

I respectfully disagree with the Honorable Circuit Court in its conclusion.

The Honorable Circuit Court argues as a established fact, that the extortion *did take place*, which is the result of the fact that the *incident* of the alleged extortion was adjudged in the first case and the presumption of innocence has been destroyed, because the second case has not gone to trial.

Petitioner is being brought to trial for a second time on an alleged extortion that the Circuit Court has already concluded that *it took place*, because in its opinion, it has so concluded. (See: Appendix II at page 6a and 7a.), when the Court states:

"The indictment focus upon different conduct; *indeed, the fraud took place between May 1982 and February, 1983, while the extortion did not occur until July and August, 1983.*" (Emphasis provided.)

The Honorable Circuit Court, as well as the Honorable District Court have been induced into error by the Prosecutor.

The first prosecution has rested on the uncorroborated statement of Agent Harry García, which made believe the grand jury that the alleged extortion presented to the grand jury without the date of its occurrence was part of the facts conducting to the first indictment.

The First Indictment was rendered by the first grand jury on February 1, 1985, on facts that took place from May 20, 1983 to February, 1983.

For the sake of argument if Petitioner would have been immediately indicted - (after the occurrence of the

alleged facts of the first indictment, - that is at any time before June, 1983) as the incident of the alleged extortion had not occurred, -it would have been impossible for the Prosecutor to have brought to the grand jury the testimony of FBI Agent Harry García saying that defendant Boscio received $120,000 as he did state on February 1, 1985 and in absence of said inflamatory incident, perhaps this Petitioner, would have never been indicted for aiding and abetting, as it occurred and even in the event of an indictment, the trial court would have never received as it did, the inflamatory evidence of said incident and perhaps he would have been acquitted.

By this conduct, the government intentionally and improperly brought an *incident* of a different time frame as an ingredient of a different offense and on so doing, chose to prosecute Petitioner, for that incident, placing him in jeopardy for the alleged extortion.

It is clear, that this is a very "abnormal" and "unique" situation, that places a person in jeopardy by the improper conduct of the prosecutor and the case agent.

This Honorable Court cannot permit this conduct to continue and to permit further prosecution for the same act by the same government who so flagrantly has misguided the court system into error.

The United States Supreme Court rendered the following guideline of prosecutorial conduct in *Berger v. United States, 295 U.S. 78,88 (1935):*

> "The United States attorney is the representative not of an ordinary party to a controversy, but a sover eignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

> whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...It is as much his duty *to refrain* from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one." (Emphasis provided.)

There is no doubt that the government through its conduct has included and made the *incident* of the alleged extortion as part of the wire fraud of the First case, and as stated by this Honorable Court:

> "A person who has been tried and convicted for a crime which has various *incidents* included in it... cannot be a second time tried for one of those *incidents*, without being twice put in Jeopardy for the same offense." *Harris v. Oklahoma (1977) 433 U.S. 682, 53 Led 2d 1054, 97 S ct 2912; In Re Nielsen 131 U.S. 176, 33 Led 118, 9 Sct 672 (1889)* (Emphasis provided)

The Circuit Court based its decision in *Blockburger v. United States* (Supra), but:

> "The Blockburger test is not the only standard determination whether succesive prosecution imper missibly involved the same offense, Even if two of fenses are sufficiently different to permit the imposition of consecutive sentences, succesive prosecutions will be barred in same circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio, 432 U.S. 161 (1977)*

As stated by the United States Supreme Court in *Abney v. United States, 431 U.S. 651 (1977) and followed in Flanagan v. United States, 79 I. ed 288, 104 S ct. (1984)*, the right

guaranteed by the double jeopardy clause is more than the right not to be convicted in a second prosecution for an offense: it is the right *not to be placed in jeopardy, that is, not to be tried for the offense at all.* (Emphasis provided.)

As stated in *Green v. Untied States, 78 S. ct. 221, 355 U.S. 199. (1957)*

> "The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued. If such great constitutional protection are given significance..."

The facts of this Case present a new issue of double jeopardy created by intentional improper conduct that is unique and should be carefully scrutinized, so that, this new modality does not generalize or become repetitive.

VI. CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

At Ponce, Puerto Rico, May 6, 1988.

JUAN LUIS BOSCIO
Pro se

APPENDIX

APPENDIX

App. Num. Page

I Judgement By the United States Court of Appeals for the First Circuit 2a-5a

II Order of the United States Court of Appeals for the First Circuit. Denying Petition for Rehearing en banc 6a-7a

III Grand Jury Proceedings Agent Garcia's Testimony 8a-9a

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1103

UNITED STATES OF AMERICA
Appellee,

v

JUAN LUIS BOSCIO,
Defendent, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(Hon. Carmen C. Cerezo, U.S. District Judge)
Before
Coffin and Breyer, Circuit Judges,
and Caffrey,* Senior District Judge.

Nydia María Diaz-Buxo with whom Rafael Toro Cuberge was on brief for appellant.
Lydia Lizarribar, Assistant United States Attorney, with whom Charles E. Fitzwillaim, Acting United States Attorney, was on brief for appellee.

FEBRUARY 2, 1988

*Of the District of Massachusetts, sitting by designation.

Breyer, Circuit Judge. Juan Luis Boscio appeals from a district court's denial of his motion to dismiss an indictment on the basis of double jeopardy.

Appellant says the government first put him in jeopardy when, on February 1, 1985, it charged appellant with devising a "scheme... to defraud" and "for obtaining money" through "false... representations" using interstate postal and wire facilities in the process, 18 U.S.C. §§ 1341, 1343 (1982), and with "aiding and abetting" others others to do the same, 18 U.S.C. § 2 (1982). The indictment spelled out a plan that relied on the machinations of Luis Serrano, a man who wore three hats, as (1) a vice president of Shearson American Express, (2) a representative of the city of Ponce's Municipal Development Authority (in charge of managing the Development Authority's Shearson bank account), and (3) an owner of a private firm called Ponce Developers, Inc. Essentially, Serrano (as Shearson) promised to lend the Develpoment Authority $3 million dollars. The Development Authority would put up $3 million in "FHA" mortgages and "Title One" notes as security. Serrano had the Development Authority promise to lend Ponce Developers (Serrano again) $3 million. Ponce Developers would put up $3 million in the same "FHA" mortgages and "Title One" notes as security. Serrano had Ponce Developers promise to give $2 million to the Home Federal Savings and Loan Association. Home Federal Savings would give Ponce Developers $1.7 million in the same mortgages and notes.

The indictment goes on to say that all this was worked out in May 1982. At that time Shearson actually provided the $3 million. Serrano had Shearson put $2 milion in a Development Authority account and $1 million in a Ponce Developers account. Serrano then falsely told Home Federal Savings that the $2 million in the Development Authority account belonged to Ponce Developers; and, on the strength of this lie, Home Federal Savings gave Ponce Developers the $1.7 million worth of Federal Housing Act

notes and mortgages. Serrano used them as part of the collateral for the Shearson loan to the Development Authority.

The indictment concludes by saying that Serrano sent $3 million through the wires to New York. It says that Boscio, who was President of the Development Authority's Board of Directors, helped Serrano throughout, and together with Serrano, sent the $3 million to New York. Ajury found Boscio guilty of the offenses charged in the indictment.

On October 31, 1985, the government filed another indictment charging Boscio with "extortion... under color of official right" in violation of 18 U.S.C. § 1952 (1982), and with conspiracy to commit extortion (see 18 U.S.C. § 371 (1982)). The indictment describes a plan whereby Serrano would obtain money from Home Federal Savings by cashing Shearson checks and (with the help of the Development Authority) depositing money at Home Federal Savings that belonged to the Authority. It says that Boscio received about $120,000 of the money in June 1983, and he received another $100,000 in August 1983. It says that Boscio obtained the payments by threatening that otherwise Serrano would lose the Development Authority's Shearson business.

"Appellant Boscio asked the district court to dismiss the second indictment on the ground that, given the first conviction, it placed him in "double jeopardy," U.S. Const., amend. V. Neither the magistrate nor the district judge could understand the legal basis of appellant's claim. Nor can we. The two indictments charge violations of different statues (aimed at achieving different objectives) with different elements, proven with different evidence. *Cf. Blockburger v. United States, 284 U.S. 299 (1932).* The indictments focus upon different coonduct; indeed, the fraud took place in May 1983, while the extortion did not occur until July or August, common features of the transactions charged un-

der the two indictments are (1) the government introduced evidence of the extortion at the appellant's trial for fraud, and (2) some of the money used to make the extortion payments came from the $1 million Development Authority account at Shearson set up as part of the fraud. The conduct allegedly leading up to the extortion is nonetheless sufficiently different from the conduct making up the fraud so that this evidentiary overlap would not come close to making a double jeopardy claim, even under the most expansive readings which Boscio has been able to find. *See Petite v. United States, 361 U.S. 529, 533 (1960) (Brennan, J., concurring in the judgement); Abbate v. United States, 359 U.S. 187, 196 (1959) (Brennan, J., concurring in the judgement).*

The district court denied Boscio an evidentiary hearing on this matter, for counsel has pointed to no controverted issues of fact that would make a difference to the outcome.

The judgement of the district court is
Affirmed.

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 87-1103

UNITED STATES OF AMERICA,
Appellee,
v.
JUAN LUIS BOSCIO,
Defendant, Appellant.

Before
Campbell, Chief Judge,
Coffin, Bownes, Breyer, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered: March 10, 1988

The petition for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service, and the majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc, it is ordered that the petition for rehearing en banc be denied.

The following correction should be made to the opinion. On page 4, lines 17 through 19, the sentence should be rewritten to read:

The indictments focus upon different conduct; indeed, the fraud took place between May 1982 and February 1983, while the extortion did not occur until July and August, 1983.

By the Court:
Francis P. Scigllano
Clerk.

[cc: Mss. Diaz and Lizarribar]

APPENDIX III

GRAND JURY PROCEEDINGS

In the Matter of:	United States of America v. Miguel A. Serrano, Juan Luis Boscio, William Satmp
Date:	February 1,1985
Testimony of:	Harry García

By: Lydia Lizarribar, Assistant United States Attorney

Q Sir, do you know if any of the other co-defendants in this case received any money from that—those personal accounts of Mr. Miguel Serrano?

A From this million dollars, through my investigaton, I traced that $120,000 he gave to Mr. Boscio.

Q And in what form, sir?

A In the form of money orders.

Q Were those money orders or cash?

A Yes.

Q Do you know if they were cashed by Mr. Juan Luis Boscio?

A Mr. Boscio, from these, Juan Luis Boscio, from these money orders, all that he received was $10,000.

Q Very well, sir.

A And make it more clear.

Q Please go on.

A What I want to reflect on the board, what the board shows right now is exactly what happened and these two arrows reflect where the money, the physical money ended up at.